IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-556

SID HARVEY, INC. AND SID HARVEY BROOKLYN CORP.,

Petitioners,

vs.

LOCAL 810, METALS, ALLOYS, HARDWARE FABRICATORS AND WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.,

Respondents.

REPLY BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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TABLE OF AUTHORITIES.

Cases.	PAGE
American Boiler Manufacturers Assn. v. NLRB, 404 F. 2d 556 (8th Cir. 1968)	5
Carpet, Linoleum Layers' Union No. 419 v. NLRB, 429 F. 2d 747 (D. C. Cir. 1970)	4
Carpet, Linoleum Layers' Union No. 419 v. NLRB, ... F. 2d ....., 80 LRRM 3254 (D. C. Cir. 1972)	4, 7
Local 636, United Association v. NLRB, 430 F. 2d 906 (D. C. Cir. 1970)	5
Local 742, Carpenters v. NLRB, 444 F. 2d 895 (D. C. Cir. 1971) cert. den. 404 U. S. 986 (1972)	5
Miami Newspaper Pressman's Local 46 v. NLRB, 322 F. 2d 405 (D. C. Cir. 1963)	7
National Woodwork Mfg. Assoc. v. NLRB, 386 U. S. 612 (1967)	3, 6
N. L. R. B. v. Denver Building and Construction Trades Council, 341 U. S. 675 (1951)	4, 5, 7
N. L. R. B. v. Local 825, Operating Engineers, 400 U. S. 297 (1971)	6
N. L. R. B. v. Metropolitan Life Insurance Co., 380 U. S. 438 (1965)	3
N. L. R. B. v. United Insurance Company, 390 U. S. 254 (1968)	6
Republic Aviation Corp. v. NLRB, 324 U. S. 793 (1945)	7
J. G. Roy & Sons v. NLRB, 251 F. 2d 771 (1st Cir. 1958)	4
Universal Camera Corp. v. NLRB, 340 U. S. 488 (1951)	6
Henry Wurst, Inc., 187 NLRB No. 63; 76 LRRM 1083	2, 3

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The Chamber previously filed a brief *amicus curiae*[1] in the instant case in support of the Petitioner[2] to present its views to the Court on the major question of labor law here presented: whether actual common control, as opposed to the potential control inherent in common ownership or economic integration, is required to defeat the Act's

1. The brief was filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

2. The petition was filed with this Court on October 9, 1972.

neutrality protections. In their briefs in opposition to the petition, the Board and Respondent present arguments which, the Chamber believes, attempt to obscure this fundamental issue based upon a misconception of the significance and import of the lower court's ruling. Accordingly, a further presentation of the Chamber's views is warranted.

1. Contrary to the assertions made by the Board and the Respondent (Bd. Br., p. 3; Resp. Br., p. 9), the lower court's refusal to accept the Board's neutrality finding[3] was grounded upon its fundamental disagreement with the "day-to-day" common management test utilized in assessing whether the picketed employers in the instant case were properly treated as "'other employers' within the meaning of the Act". App. B, p. 35a. It was the Board's alleged failure to apply "the correct legal test" (App. B, p. 35a), and not any disagreement concerning an "evaluation of the facts of this particular case" (Bd. Br., p. 3), which sharply differentiates the court's position from the Board's. Board Counsel's effort here to reconcile the court's blanket rejection of its active common management test on a factual basis or, alternatively, upon an alleged retrospective retraction of that test to "integrated, straight-line operations" (Bd. Br. at p. 3),[4] advanced for

3. The Board concluded "that despite the cooperation and mutual assistance among the various corporations . . ., there is not that appreciable integration of management and day-to-day operations between . . . the primary employer, and the others, to make them allies" and deprive them of the statutory protection. (App. 14a.)

4. The Board's *Henry Wurst, Inc.*, decision (187 NLRB No. 63; 76 LRRM 1083) does not, as its counsel now asserts for the first time, evidence a retreat from the common active management principle. Bd. Br. at p. 3. In that case, unlike the instant one, the *Wurst* operations were all conducted under one roof (within "separate sections of a single U-shaped building") and *common management control* was, in fact, *exercised* through the joint scheduling of production operations "to insure a smooth flow of

the first time in arguments addressed to this Court,[5] amounts to an improper "post-hoc rationalization for agency action" which "the courts may not accept. . . ." See, *N. L. R. B.* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 444 (1965).

2. As the Respondent correctly acknowledges in its brief, the core question here involved is whether the " 'day-to-day' operational control" test is inconsistent with the "central [neutrality] scheme" underlying this Court's *National Woodwork* opinion.[6] Resp. Br., at p. 7. Under the lower court's view, *National Woodwork*[7] compels re-

work." 76 LRRM 1083, at 1084. These critical factual distinctions undoubtedly account for the failure of any party, including the court below, to cite or even discuss the *Wurst* in the instant case. Counsel's "post-hoc" effort to equate the Sid Harvey operations—consisting of four companies in the New York Metropolitan Area and "twenty-five more corporations all over the United States, from Maine to Wisconsin" with those of *Wurst*, so as to allow the Union having a dispute "with Sid Harvey of Reading (Pennsylvania) . . . to picket with impunity at the premises of Sid Harvey Central Supply, Inc. in Lombard, Illinois", would "far from effectuating the policies of the Act, manifestly do them violence." Bd. Br. in Court of Appeals, at p. 22.

5. The Board's brief to the court below uniformly urged the necessity for applying the "standard enunciated by the courts in *Roy and Bachman*" (citations omitted)—that "in order to establish that two corporations are a single employer with respect to Section 8(b)(4), there must be common ownership *and* active, not merely potential common control." Bd. Br. to Ct. of Appeals, at p. 21 n. 12.

6. National Woodwork Mfg. Assoc. v. N. L. R. B., 386 U. S. 612 (1967).

7. As noted in the Chamber's previous brief (pp. 6-8), the instant case is one of a series of recent decisions extending the "vortex" rationale of *National Woodwork* to defeat the neutrality of employers who neither created nor actively controlled the disputed employment conditions. It is this severe dislocation of the traditional neutrality concept, predicated upon *National Woodwork*, which the instant case represents that warrants this Court's attention.

jection of the traditional common management control standard[8] and requires, instead, a "common sense" assessment of the economic "relationship between the . . . employers being picketed." App. B. p. 37a. Where those relationships reveal "centralized or overlapping ownership" or that "the operations and success of each is interrelated with and heavily dependent upon the others . . . ," they automatically become "economic allies" under the court's approach. This result obtains even though, as in the present case, the picketed secondary employers do not employ the disputing employees or exercise control over their employment conditions.

It is this revived concept of "economic realism"[9] which

8. The essential conflict between the court of appeals' decisions discussed in Petitioner's brief (Pet. Br. at pp. 5-8) and the decision below is not factual, as the opposition briefs assert, but a basic doctrinal conflict concerning the requisite standards for assessing neutrality between commonly owned and interrelated employers. These decisions, unlike the instant one, uniformly require a showing of "actual common control over labor policies", as distinct from potential control, before separate employers can be treated as allied for secondary boycott purposes. See *J. G. Roy & Sons* v. *N. L. R. B.*, 251 F. 2d 771, 773 (1st Cir. 1958), and cases discussed in the Petition at pp. 7-8.

9. Although the instant case arises in the context of commonly owned concerns, the paramount underlying issue of whether potential, as distinct from actual control, removes the separate neutrality status of business entities is a recurring one which continues to create considerable disagreement between the Board and the courts. For example, the "economic realism" test was first enunciated in *Carpet, Linoleum Layers' Union No. 419* v. *N. L. R. B.*, 429 F. 2d 747 (D. C. Cir. 1970) (relied upon by the decision below) in which the court initially argued that a retailer's potential control over its outside contractors' labor policies, based on the close functional integration and economic interdependence revealed in their business relationships, disqualified the retailer from the Act's neutrality protections. On further reflection, however, the court significantly revised its views consistent with the Board's decision on remand. *Carpet, Linoleum Layers Union No. 419* v. *N. L. R. B.*, ... F. 2d ..... 80 LRRM 3254 (D. C. Cir. 1972). In its revised opinion, the court eschewed its former "economic and policy considerations analysis" as being inconsistent with *N. L. R. B.* v. *Denver Building and Construction Trades*

underlies the decision and others,[10] and the consequent geometrical increase in the effect of strikes flowing from this concept, which vitally concerns the Chamber and warrants this Court's review.[11] Moreover, since the economic

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Council, 341 U. S. 675 (1951), and the legislative history of the Act and held the "economic interdependence [even though of a vertical, straight-line nature]" between the retailer and his contractors to be insufficient to destroy the Act's neutrality protections. The court's revised approach is wholly inconsistent with the economic and policy analysis adopted by the court below here.

10. See, e.g., *Local 742, Carpenters* v. *N. L. R. B.*, 444 F. 2d 895 (D. C. Cir. 1971), cert. den. 404 U. S. 986 (1972) involving the related "right to control" test protecting business entities in disputes which they have neither created nor control. As in the instant case, the court severely criticized the Board test as being inconsistent with *National Woodwork* and adopted, in its place, a standard which removes neutrality protections for employers having an "economic interest" in the disputed employment conditions. See similarly, *Local 636, United Association* v. *N. L. R. B.*, 430 F. 2d 906 (D. C. Cir. 1970); *American Boiler Manufacturers Assn.* v. *N. L. R. B.*, 404 F. 2d 556, 560 (8th Cir. 1968).

11. The preservation of the neutrality concept against the continued erosion exhibited by this and similar rulings (See, n. 10 and 11, supra), is a matter of continuing concern to the Chamber's membership. Thus, the Chamber recently participated in another case as *amicus curiae* in urging this Court to further explicate its *National Woodwork* holding in light of continuing eroding effect of that doctrine upon the entire secondary boycott area. See, Chamber's Br. in *J. L. Simmons Company, Inc.* v. *United Brotherhood of Carpenters and Joiners of America, et al.* (No. 71-357, Oct. Term, 1971). Significantly, two Justices of this Court voted to grant certiorari (Mr. Justice Brennan and Mr. Justice White) even though the Board opposed the Petitioner's request based upon its desire to reexamine its "right to control" test in light of the court's remand. 30 L. Ed. 2d 371. Thereafter, the Board invited the Chamber, along with a broad spectrum of other interested groups, to present its views to the Board sitting *en banc*. Although arguments were completed a number of months ago, the Board has not yet issued its decision. The Board's difficulties in resolving this issue reflect the continuing uncertainty regarding the controlling neutrality standards which the courts' decisions here and elsewhere have engendered since *National Woodwork*. This confusion will continue absent clarification by this Court.

realism standard attributed to *National Woodwork* by the court below and others severely undermines the traditional neutrality concepts of this Court's *Denver Building Trades* and *Burns and Roe*[12] decisions, the time is now ripe for a needed reconciliation of these decisions.

3. Moreover, even if the court's refusal to accept the Board's critical findings was predicated solely upon a differing "evaluation of the facts of this particular case", it was plainly not warranted in substituting its views for those of the Board in these circumstances. Such *de novo* judicial rejection of the Board's findings would violate this Court's stricture compelling acceptance of the Board's factual determinations where supported by substantial evidence in the record as a whole. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 488 (1951). Additionally, assuming the Board's neutrality finding "was not a purely factual question, but involved the application of law to facts", the reviewing court was not at liberty to "displace the Board's choice between two fairly conflicting views, even though the court . . . (could) justifiably have made a different choice had the matter been before it *de novo.*" 340 U. S. at 488; See also *N. L. R. B.* v. *United Insurance Company*, 390 U. S. 254, 260 (1968).

The "least that can be said for the Board's decision" in the instant case "is that it made a choice between two fairly conflicting views, and under these circumstances, the Court of Appeals should have enforced its order." *United Insurance*, 390 U. S., at 260. "[A]s the agency established by Congress and entrusted with the major task of

12. *N. L. R. B.* v. *Local 825, Operating Engineers*, 400 U. S. 297 (1971), in which this Court reaffirmed its intention to protect employers having close business ties from a "disruption of business relationships" even where the Union's intent is to cause only a "partial", as opposed to a total, cessation of those relationships. 400 U. S. at 304-305.

interpreting and applying the Act,[13] it was the Board's function, not the court's, to "make the required determination" of the applicable standard for evaluating employer neutrality and its application to the facts "in a particular case." *Carpet Layers, Local 419* v. *N. L. R. B.*, ____ F. 2d ____, 80 LRRM 3254 at 3259; *N. L. R. B.* v. *Denver Building Trades Council*, 341 U. S. 675 at 691-692 (1951). Since the active common management test, as applied by the Board in this case, conforms with the dual Congressional objective of confining the labor conflict "to the employer in whose labor relations the conflict has arisen while shielding all others from the pressures generated by that conflict",[14] the lower court exceeded its powers in rejecting the Board's ultimate findings.

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13. See, e.g., *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 800 (1945):

> "one of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration."

14. See *Miami Newspaper Pressman's Local No. 46* v. *N. L. R. B.*, 322 F. 2d 405 at 410 (D. C. Cir. 1963) and Chamber's previous Br. at pp. 3-4.

CONCLUSION.

For the foregoing additional reasons, as well as the reasons previously set forth by the Chamber and the Petitioner, the petition for writ of certiorari should be granted.

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